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## Protean Jus Ad Bellum

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## **PROTEAN *JUS AD BELLUM***

Sean D. Murphy\*

### I. INTRODUCTION

On the 100th anniversary of the 1907 Hague Peace Conference, it is entirely appropriate to look back at the accomplishments of that event, and at the strides that have been made over the past century for developing international law and institutions. Perhaps more important, however, is to consider the direction international law will take during the next 100 years—to ask about the legacy that will be discussed at the 200th anniversary of the Hague Conference. The purpose of this essay is to consider the past, present and, especially, future state of the *jus ad bellum*, the set of rules in international law designed to regulate the resort to war by states. Will the *jus ad bellum* in 2107 look the same as it does today or, as was the case for the past 100 years, might we anticipate efforts to progressively develop it in some fashion?

The *jus ad bellum* is generally viewed as a static field of law. The standard account is that when the UN Charter was adopted in 1945, it enshrined a complete prohibition on the use of force in inter-state relations, except when action is being taken in self-defense against an armed attack or under authorization of the UN Security Council. No other exceptions to the general prohibition are permitted, whether for purposes of rescuing ones nationals abroad, saving aliens from widespread deprivation of human rights, acting preemptively against a grave but distant threat, or for any other reason.

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\* Patricia Roberts Harris Research Professor of Law, George Washington University. This essay benefitted from comments by Vijay Padmanabhan and by participants at both the Walther-Schücking-Instituts für Internationales Recht November 2007 conference in Kiel, Germany, and the Temple Law School March 2008 International Law Colloquium in Philadelphia. My thanks to Kelly Dunn for research assistance.

To the extent that some states or commentators see value in further exceptions, the approach is generally still to view the *jus ad bellum* as static, but to engage in contorted interpretations of the Charter's text so as to allow further exceptions, or to admit that no exceptions exist but to argue that deviation is legitimate in extreme circumstances even if not lawful. Of course some observers, whose views are largely grounded in realism theories of international relations, simply conclude that the *jus ad bellum* is a utopian notion that has no real relevance for contemporary inter-state behavior.

Yet it seems likely that in the years to come, many states and non-state actors will increasingly insist upon a different vision of the *jus ad bellum*, one that conceives of it as more protean in nature. Protean *jus ad bellum* acknowledges that, as of 1945, the static view was correct, but that over time—as we approach the 70th anniversary of the United Nations—the *jus ad bellum* is changing, buffeted in particular by several significant developments: (1) the emergence of weapons of mass destruction of various types potentially controllable by states and non-state actors; (2) the rise of global terrorism as a mechanism for projecting violence against states by non-state actors; (3) the elevation of the person to a central place in the realm of international law, both in terms of being protected and in terms of being accountable for misconduct; (4) the inability of the Security Council to be accepted by all states as a disinterested arbiter willing and capable of acting to address all threats to international peace and security as they arise; and (5) the continuing erosion of the sanctity of the sovereign state, resulting from exposure to myriad effects of globalization, including intrusive transnational rule of law programs, election monitoring, incessant and extensive media coverage, powerful transnational corporations and non-governmental organization, and relatively unrestricted transborder movement of capital, goods, and persons across borders.

Further, protean *jus ad bellum* refers to a normative regime that is less oriented toward a textual codification of the norm and more toward its practical and nuanced application in a complex and changing global environment. As such, protean *jus ad bellum* resists a binary approach of regarding all uses of force of a particular type (e.g., humanitarian intervention) as being lawful/unlawful in all situations, and favors instead an approach that calibrates a range of factors that

are important in predicting the likely response of the global community to a coercive act. Certain forms of state practice, such as the 1999 NATO bombing of Serbia in support of Kosovar Albanians, will lend credence to the vision of protean *jus ad bellum*, even as other state practice continues to support the static view.

This essay suggests that the failure to either formally accept or reject the idea of protean *jus ad bellum* is likely, over time, to diminish the *jus ad bellum*'s effectiveness as a normative regime. Already, there exists considerable confusion or disagreement about the contemporary parameters of the *jus ad bellum*; if you were to ask a random group of legal advisers to foreign ministries their views on whether, for example, humanitarian intervention, or using force to rescue nationals abroad, or a cross-border raid against a terrorist camp, are permissible under the *jus ad bellum*, you are likely to receive a mixture of answers: some saying yes; some saying no; some insisting that it depends on the circumstances; and some refusing to respond to the question. Too often transnational uses of military force are occurring in circumstances that are inconsistent with the idea of a static *jus ad bellum*: states and non-state actors are, at least in some situations, tolerating certain types of force in response to the overarching developments noted above. As the International Criminal Court moves closer to including aggression within its mandate for indicting and prosecuting persons, government leaders may see greater value in clarifying what uses of force are permissible.

Things could continue as they are. But in the long-term, if the *jus ad bellum* is not to break down, then a more formal way should be found either to reject the notion of protean *jus ad bellum* or to accept it, and if the latter, then to try to identify the contemporary rules in this area, either through formal amendment of the UN Charter, through authoritative interpretations by the principal organs of the United Nations or regional organizations, or through other means.

## II. STATIC *JUS AD BELLUM*

In many areas of international law, the law accommodates the possibility of change. Under the Vienna Convention on the Law of Treaties, for example, practice of the parties subsequent to the

entry into force of treaty is a salient factor for interpreting and reinterpreting the meaning of the treaty.<sup>1</sup> Even if the treaty meant X<sup>1</sup> at the time it was adopted, practice by the states thereafter may change the norm to mean X<sup>2</sup>. In the context of a treaty establishing an international organization, such practice may include precedents set by institutional practice of the organization itself; moreover, greater license is typically granted for teleological interpretations of such treaties in recognition of the need for the international organization to evolve over time.<sup>2</sup>

Customary international law, of course, is also built upon the idea that contemporary state practice, in conjunction with *opinio juris*, serves to establish the law, even if that law was different at some earlier time. General principles of law, the third main source of international law, can also change to the extent that principles of law operating in legal systems worldwide change over time. International judicial decisions, though in theory limited to the parties in the case before the tribunal, are widely regarded as assisting in the development and evolution of international law over time.<sup>3</sup>

The *jus ad bellum*, however, is viewed by most states and scholars as a static norm. Under Article 2(4) of the UN Charter, a state may not use force against another state.<sup>4</sup> Under Article 51, a state may respond in self-defense to an “armed attack.”<sup>5</sup> Under Chapter VII of the Charter, the UN Security Council, in response to a threat to the peace, may authorize states to take forcible measures.<sup>6</sup>

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<sup>1</sup> See Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331 (VCLT).

<sup>2</sup> See, e.g., Louis B. Sohn, *Interpreting the Law*, in UNITED NATIONS LEGAL ORDER 186-87 (Oscar Schachter & Christopher C. Joyner eds., 1995).

<sup>3</sup> See, e.g., Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 15 (Mar. 3) (dissenting opinion of Judge Alvarez) (asserting that ICJ decisions “create precedents” and dynamically change international law).

<sup>4</sup> Charter of the United Nations, art. 2(4), June 26, 1945, 59 Stat. 1031.

<sup>5</sup> *Id.*, art. 51.

<sup>6</sup> *Id.*, arts. 41 & 42.

Put all together, static *jus ad bellum* maintains that a state may not use armed force against another state unless it is defending against an armed attack or is authorized by the Security Council to do so.

Though it has been more than sixty years since enactment of the Charter, and though there is considerable state practice involving uses of coercion in circumstances that do not fit the basic paradigm, no consensus exists that the paradigm has changed in any significant way. No doubt there are several reasons why this particular norm has continued to be viewed as static. First, as a formal matter, since the norm is enshrined in the Charter, and since the Charter has a superior status within the hierarchy of international law,<sup>7</sup> there is a reluctance to see the norm change absent a formal alteration, such as through amendment of the Charter. This is not to say that the Charter can only change through formal amendment; plenty of examples exist of changes to the Charter through consensus interpretation of the UN member states. Yet such change is not common and does require a high threshold of consensus. Second, the *jus ad bellum* is considered a fundamental element in international law, so much so that most view it as a norm of *jus cogens* that cannot be altered by states even through treaty relations.<sup>8</sup> While alterations of other norms may have significant social or economic effects (e.g., establishing and expanding an exclusive economic zone outside the territorial sea), the stakes in altering the *jus ad bellum* are viewed as considerably higher, and as potentially unleashing a wide range of undesirable coercive behavior. Third, by its nature, the field of *jus ad bellum* does not have extensive and repeated state practice that allows for definitive evolution of the norm; rather, incidents are sparse, can often be distinguished through reference to unique factual scenarios, and often elicit conflicting interpretations by states and scholars concerning

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<sup>7</sup> *Id.*, art. 103.

<sup>8</sup> The VCLT defines *jus cogens* as a norm “accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” VCLT, *supra* note 1, art. 53. The ICJ has referred to the prohibition on the use of force by one state against another as “a conspicuous example” of *jus cogens*, *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 100, para. 190 (June 27).

the significance of the incident for the law.<sup>9</sup>

The principal actors that might formally recognize a change in the norm for the most part have no incentive to do so. Senior government officials in most states have a vested interest in preserving to the extent possible a norm that prevents transnational uses of force, as a means of fortifying their own authority with respect to external threats. Indeed, states without the power to project force across boundaries appear to fear that formal changes in the *jus ad bellum* would be simply a subterfuge for potential interventionist policies of the major powers. By contrast, the more powerful states (*e.g.*, the United States or United Kingdom) seem to favor the ability to use coercive force in ways that deviate from the static *jus ad bellum* paradigm, since they tend not to feel threatened by a change. Yet even those states may prefer to try to pigeon-hole their conduct into the static *jus ad bellum* paradigm, rather than create a new precedent that might someday work to their disadvantage. Meanwhile, groups that might be best served through a change in the paradigm, such as persons facing human rights crises brought on or tolerated by their government, have little formal voice in the state-centric system about whether and how the paradigm should change. For all these reasons, the *jus ad bellum* as it was conceived in 1945 remains the dominant paradigm, at least formally, today.

### III. PROTEAN *JUS AD BELLUM*

While there is no formal consensus that the *jus ad bellum* has changed from the time it was enshrined in the UN Charter, there is considerable reason to think that is not a static norm, and that informal expectations by states and other actors about it have evolved over time and will continue to evolve in the future. Though in the aftermath of the two world wars, consensus crystalized on a broad-scale prohibition on the use of armed force, other overarching developments since 1945—the development of weapons of mass destruction, the rise of human rights law, and the emergence of global terrorism as a mechanism for projecting violence against states by non-state actors—have

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<sup>9</sup> See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005).

significantly affected attitudes toward permissible uses of force. In the face of these challenges, a credible case can be made that the *jus ad bellum* has not remained static, but has changed and is changing, or assumes different meanings when faced with different situations.

#### A. *The Pre-Charter Era*

A starting point for viewing the *jus ad bellum* as protean in nature is to take the long view and recognize that the static position is of relatively recent vintage, itself a product of change. The Hague Peace Conference of 1907, in conjunction with its 1899 predecessor, ushered in a remarkable century for the growth of public international law.<sup>10</sup> Part of that growth entailed the emergence of a highly restrictive *jus ad bellum* that did not previously exist; indeed, at the start of the twentieth century, there was no globally-accepted norm prohibiting the resort to war. The conventions adopted at the two peace conferences, however, began the process of limiting the means by which states could resort to warfare. Thus, the 1907 Hague Convention II prohibited the resort to war completely when the objective was the recovery of debt, unless the debtor State refused or neglected to resolve the matter through arbitration.<sup>11</sup> The Hague Convention III required states not to commence hostilities without previous and explicit warning.<sup>12</sup>

That military force should be resorted to only for good reasons or just cause was, of course, a sentiment that preceded the Hague Peace Conferences, harkening back to the just war doctrine of

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<sup>10</sup> The principal concern of Russian Tsar Nicholas II in convening the Hague Peace Conferences lay in a desire to limit the number of armaments possessed by the major powers of the world and hence to secure a durable peace, an effort that ultimately was not successful. *See generally* CALVIN D. DAVIS, *THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE* (1962).

<sup>11</sup> 1907 Hague Convention II Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241.

<sup>12</sup> 1907 Hague Convention III Relative to the Commencement of Hostilities, art. 1, Oct. 18, 1907.



Augustine and Aquinas,<sup>13</sup> and even further back to the *bellum justum et pium* doctrine of early Roman law.<sup>14</sup> Yet in Hague Convention II is found the first effort at a conventional prohibition on resort to war in a particular circumstance, where the purpose—economic redress—was considered the least compelling for unleashing the dogs of war. By 1928, some states were willing to take the considerably more extensive step of adhering to an instrument, the Kellogg-Briand Pact (or Pact of Paris), by which they “condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it as an instrument of national policy in their relations with one another.”<sup>15</sup>

### *B. Direct Aggression by States*

The Kellogg-Briand Pact failed to stem the outbreak of World War II, but it set the stage for the codification of Article 2(4) the UN Charter, the center-piece around which the static *jus ad bellum* is now built. Though often debated, questioned, interpreted, and reinterpreted, Article 2(4), in conjunction with Article 51, has established a quite stable and clear core normative proscription: States are prohibited from using force against other states unless they are acting in self-defense or under Security Council authorization. Though overt military attacks by one state against another continue to this day, they are readily condemned by the global community and they often, though not invariably, elicit significant counter-measures against the aggressor state. Efforts by one state to annex another are almost unheard of—Iraq’s invasion of Kuwait being the exception that proves the rule—leaving instead projections of force designed to temporarily punish a state, diminish its military capacity, or perhaps adjust a bilateral boundary. Hence, at its heart, the *jus ad bellum* now provides a formidable normative structure unheard of even 100 years ago.

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<sup>13</sup> AUGUSTINE OF HIPPO, *DE CIVITATE DEI* (THE CITY OF GOD) bk. 19, at 7 (1958); THOMAS AQUINAS, *SUMMA THEOLOGICA* ch. II-II, quae. 40, art. 1, *reprinted in* ST. THOMAS AQUINAS ON POLITICS AND ETHICS 64-65 (P. Sigmund ed.) (trans., 1988).

<sup>14</sup> *See* 1 ROBERT PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW* 17-18 (3d ed. 1879); ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 10-11 (rev. ed. 1954).

<sup>15</sup> 1928 Kellogg-Briand Pact, art. 1, Aug. 27, 1928, 46 Stat. 2343.

Even so, from the start, uncertainty existed about the scope and content of this basic paradigm. Given that Article 2(4) only refers to “force,” is the prohibition limited to use of armed force or does it proscribe other forms of coercion as well? What exactly is meant by prohibiting “threats” to use force?<sup>16</sup> If a state’s nationals are seized abroad by another state and held hostage, is that a “use of force” within the meaning of Article 2(4)? If a state responds to such action by using military force to rescue its nationals, is that self-defense against an “armed attack” within the meaning of Article 51? Various examples of “rescue of nationals” exist in state practice, but the concept does not sit easily within the terms of the Charter and hence has been controversial.<sup>17</sup> In short, even within the core Article 2(4)/Article 51 paradigm, difficult questions have arisen, prompting extensive commentary over the years.<sup>18</sup>

### C. *Indirect Aggression by States*

Uses of force during the Cold War became much more complex than the type of aggression that spawned World War II. Though direct armed conflict between states remained an important concern, other forms of coercion came to pose a more difficult challenge to the *jus ad bellum*. During the Cold War, the problem of indirect aggression forcefully emerged, whereby one state surreptitiously supplied military and economic support to mercenaries, rebels or insurgents against another state. If one were giving a talk in the 1960's about “new threats” in the *jus ad bellum*, indirect aggression by states would have been the focal point of the discussion. And because of that, it

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<sup>16</sup> See generally NIKOLAS STÜRCHLER, *THE THREAT OF FORCE IN INTERNATIONAL LAW* (2007); Marco Roscini, *Threats of Armed Force and Contemporary International Law*, 54 NETH. INT’L L. REV. 229 (2007).

<sup>17</sup> See, e.g., LILICH ON THE FORCIBLE PROTECTION OF NATIONALS ABROAD (Thomas C. Wingfield & James E. Meyen eds., 2002) (volume 77 of the U.S. Naval War College Studies series); NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* (1985).

<sup>18</sup> See, e.g., IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963); THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (2d ed. 2004).

became important to again revisit what exactly was meant by Article 2(4) and Article 51, in order to elaborate upon what was left unsaid.

One important mechanism for illuminating the meaning of the *jus ad bellum* was through its interpretation, in the context of specific incidents of state practice, by the principal organs of the United Nations—the Security Council and the General Assembly.<sup>19</sup> Throughout the initial decades of the Charter, those organs adopted various resolutions considering the projection of coercion in various contexts, especially in the Middle East and Southern Africa.<sup>20</sup> In some instances, the practice even concerned attacks by a non-state actor against a state, such as the Security Council’s condemnation as “aggression” of the 1977 attack by an invading force of mercenaries on the Marxist-led government in Benin.<sup>21</sup>

Another important mechanism were interpretations by UN organs in a more generalized fashion. In 1974 the General Assembly adopted its resolution on the Definition of Aggression,<sup>22</sup> which served to provide a non-exhaustive list of the kinds of coercion that would violate Article 2(4). The standard paradigm of one state invading or bombarding another state was included, of course, but so were other types of coercion that might have been seen as falling outside the scope of Article 2(4), such as the blockading of ports. The Definition of Aggression recognized that coercion violating Article 2(4) could arise from transboundary conduct of non-state actors—“armed bands, groups, irregulars, or mercenaries, at least when such actors were sent “by or on behalf of a State” and when the coercion was “of such gravity” as to amount the kinds of coercion prohibited

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<sup>19</sup> The path breaking study on this phenomenon remains ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963).

<sup>20</sup> *See generally* UNITED NATIONS, *HISTORICAL REVIEW OF DEVELOPMENTS RELATING TO AGGRESSION* 225-51 (2003).

<sup>21</sup> S.C. Res. 405 (Apr. 14, 1977).

<sup>22</sup> G.A. Res. 3314 (XXIX) (Dec. 14, 1974).

to states.<sup>23</sup>

The 1986 judgment by the International Court of Justice in the *Nicaragua* case<sup>24</sup> served as something of a lightening rod for consideration of the meaning of direct and indirect aggression in the Cold War era. The Court had not previously opined on the meaning of Articles 2(4) and 51, though it had addressed some issues relating to the use of force in the course of deciding the *Corfu Channel* case.<sup>25</sup> The reasoning of the Court in *Nicaragua* was initially somewhat clouded by the highly charged politics of the case, as well as the U.S. refusal to participate in the merits phase, but over time the Court's judgment seems to have passed into the corpus of accepted jurisprudence, to the point where the United States itself now cites to the judgment as authority.

The basic paradigm set forth by the *Nicaragua* case found that certain acts, such as the mining of another state's harbors and attacks on another state's naval vessels and oil facilities, were violations of Article 2(4), a not particularly surprising outcome. More interesting was the Court's conclusion that certain acts in violation of Article 2(4) might not rise to the threshold of being an "armed attack" for purposes of Article 51, and therefore could not be responded to through the exercise of self-defense. This lack of symmetry between Articles 2(4) and 51 is well-grounded textually in the Charter, but it also rather unsatisfactorily invites coercive behavior that operates below the radar of "armed attack," and hence has been criticized.

Another notable feature of the Court's decision was its recognition that an armed attack might occur through the conduct of non-state actors operating across a border. In that regard, the Court confirmed that attribution of such conduct to a State was important in triggering a right of self-defense against that State. Since the Court was not persuaded that the assistance to the Salvadorian

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<sup>23</sup> *Id.*, art. 3(g).

<sup>24</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

<sup>25</sup> *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9).

armed opposition was imputable to Nicaragua, nor that it was on a “scale of any significance,” the United States had no right to embark on collective self-defense on behalf of El Salvador against Nicaragua.

*D. Distant But Grave Threats*

The Cold War also saw uncertainty about the temporal scope of the right of self-defense under the Charter. Some maintained that a state could only respond in self-defense after having suffered an armed attack from another state. The text of Article 51 supports that position, since it acknowledges a right of self-defense only “if an armed attack occurs” against a UN Member.<sup>26</sup>

Yet the complex ways in which contemporary armed coercion can occur, and the dire consequences of a delayed response to that coercion, have prompted observers to advance various arguments for why self-defense may be undertaken even prior to an armed attack. One approach is to emphasize a right of *anticipatory* or *interceptive* self-defense, by which is meant acting in self-defense when there is convincing evidence that an armed attack is occurring even though the attacker has not yet penetrated the defending state’s frontier.<sup>27</sup> Thus, while it was Israel who first opened fire in the 1967 Six Days War, it has been argued that Israel was responding to an “incipient armed attack by Egypt (joined by Jordan and Syria),” as evidenced by Egypt’s “peremptory ejection of the United Nations Emergency Force from the Gaza Strip and Sinai Peninsula; the closure of the Straits of Tiran; the unprecedented build-up of Egyptian forces along Israel’s borders; and constant sabre-

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<sup>26</sup> IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 278 (1963) (“the view that Article 51 does not permit anticipatory action is correct and . . . arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence.”); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 702 (6th ed. 2003) (“Since 1945 the practice of States generally has been opposed to anticipatory self-defence.”).

<sup>27</sup> See, e.g., QUINCY WRIGHT, *THE ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF WAR* 60 (1961) (“it is not unreasonable to assume that an ‘armed attack’ is intended to include an immediate threat of armed attack, thus justifying military counteraction in individual or collective self-defence before there is an actual armed attack.”).

rattling statements about the impending fighting.”<sup>28</sup> Those in favor of allowing such anticipatory or interceptive self-defense sought to extend the concept of an external armed attack to the earliest stages of its unfolding (*e.g.*, an “armed attack” begins as soon as your opponent commences warming up its missile silos or directing its battle carrier group toward your coast) or sought to downplay the express text of Article 51 as illustrating but not limiting the manner of self-defense. As a last resort, some observers have stated that such anticipatory action was unlawful, but “may be justified on moral and political grounds,” such that “the community will eventually condone [it] or mete out lenient condemnation.”<sup>29</sup>

Some state practice supported this position but, as in most areas of the *jus ad bellum*, the practice was too infrequent and too contested to lead to a consensus position. In 2005, a high-level panel of experts convened by UN Secretary-General Kofi Annan issued a report endorsing the concept of a limited right of unilateral preemptive action when “the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.”<sup>30</sup>

Still others have insisted that for especially grave threats, such as the development of a nuclear or other mass destruction weapon by an unpredictable state, it was also permissible to resort to armed force months or even years in advance to prevent the threat from occurring.<sup>31</sup> Sporadic practice lent some credence to this concept of *preemptive* or *preventive* self-defense, such as the 1962 U.S.-led “quarantine” of Cuba in response to the planned deployment of long-range missiles

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<sup>28</sup> YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 172-73 (3d ed. 2001).

<sup>29</sup> ANTONIO CASSESE, *INTERNATIONAL LAW* 361-62 (2d ed. 2005).

<sup>30</sup> UN Secretary-General's High-level Panel on Threats, Challenges and Change, para. 188, U.N. Doc. A/59/565 (Dec. 2, 2005) [hereinafter “High-level Panel Report”].

<sup>31</sup> For a recent proposal, with a preference for authorization by the United Nations or a regional organization, but allowing residually for unilateral action, see Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 *FOREIGN AFF.* 136, 137 (Jan./Feb. 2004) (“Like the responsibility to protect, the duty to prevent begins from the premise that the rules now governing the use of force, devised in 1945 and embedded in the UN Charter, are inadequate.”).

or the 1986 U.S. bombing raids against Libya purportedly to stem future Libyan terrorism. Yet, again, the practice was too uneven to demonstrate widespread acceptance. Indeed, in some instances, such as the 1981 Israeli attack against a nascent Iraqi nuclear facility at Osirak, the condemnation of the action by the UN General Assembly as “aggression”<sup>32</sup> and by the Security Council as a violation of the UN Charter<sup>33</sup> strongly suggested that such action was prohibited.

Most recently, this concept of preemptive or preventive self-defense was endorsed by the Bush Administration in its statements on the U.S. national security strategy, which identified an evolving right under international law for the United States to use military force preemptively against the threat posed by “rogue states” possessing WMDs.<sup>34</sup> The U.S. invasion of Iraq in 2003, though technically undertaken based on a legal theory of Security Council authorization,<sup>35</sup> has widely been interpreted as an application of the doctrine of preemptive or preventive self-defense. The 2005 U.N. high-level panel did not adopt this concept, finding that if there are “good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.”<sup>36</sup>

#### *E. Grave Threats to Persons*

One of the signature developments of international law in the twentieth century was the rise

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<sup>32</sup> G.A. Res. 36/27 (Nov. 13, 1981).

<sup>33</sup> S.C. Res. 487 (June 19, 1981).

<sup>34</sup> WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 17, 2002) (“For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. . . . We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”).

<sup>35</sup> See Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 174-76 (2004).

<sup>36</sup> UN Secretary-General's High-level Panel Report, *supra* note 30, at para. 190.

of human rights; the recognition that central to the project of the rule of law in inter-state affairs is the protection of persons from the excesses of their own governments. At the time the Charter was adopted, the concept of human rights was known, but was radically under-developed. Through the establishment of a series of multilateral treaties and associated institutions, human rights has emerged as a powerful normative regime for identifying protections that states owe to their nationals and for promoting the global monitoring of those rights. Moreover, the field of human rights has helped open the door for imposition of criminal responsibility on those persons who unleash human rights violations and in some situations illuminated connections between rights-abuse and threats to international peace.

The interface of human rights protections and the use of force prohibition has been troubled, especially since the end of the Cold War. The static *jus ad bellum* paradigm on its face provides no opening for the transnational use of force to protect the rights of persons within the targeted state absent Security Council authorization. Textual arguments have been deployed in favor of regarding humanitarian intervention as consistent with Article 2(4) since it is not the kind of force proscribed by that article<sup>37</sup> or as consistent with Article 51 since “self-defense” necessarily embraces the notion of defense of others,<sup>38</sup> while arguments more rooted in moral philosophy or natural law call for interpreting ambiguous rules in favor a just outcome, thus permitting use of force when necessary to save lives.<sup>39</sup>

Arguable examples of intervention undertaken to prevent human rights crises occurred during the Cold War, such as the interventions of India in East Pakistan in 1971, Vietnam in Cambodia in 1978, or Tanzania in Uganda to oust Idi Amin. After the Cold War, humanitarian crises in the 1990's,

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<sup>37</sup> See, e.g., W. Michael Reisman, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 177 (Richard Lillich ed., 1973).

<sup>38</sup> See, e.g., GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* (2008).

<sup>39</sup> See, e.g., FERNANDO TÉSON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (3d ed. 2005).



especially in Rwanda, continued to provoke a robust debate over the legality of humanitarian intervention.<sup>40</sup> Perhaps the high point to date was the March/April 1999 NATO bombing campaign against the Federal Republic of Yugoslavia (Serbia), undertaken to prevent its government from engaging in ethnic cleansing and atrocities in the autonomous province of Kosovo, which in 2008 has become an independent state.

Shortly after the Kosovo incident, an International Commission on Intervention and State Sovereignty (ICISS) (established by the Government of Canada) issued a December 2001 report entitled *The Responsibility to Protect*, which sought to provide a legal and ethical foundation for humanitarian intervention.<sup>41</sup> The report asserted that a responsibility to protect (or “R2P”)<sup>42</sup> exists under international law. Further, the report stated that in circumstances when the Security Council fails to discharge that responsibility, “in a conscience-shocking situation crying out for action,” then it “is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by.”<sup>43</sup> By contrast, the 2005 U.N. high-level panel, writing in the wake of the 2003 U.S. intervention in Iraq, agreed with the ICISS that there existed an “emerging norm that there is a collective international responsibility to protect,” but concluded that armed force may be used to fulfil the responsibility only if so authorized by the Security

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<sup>40</sup> See, e.g., SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 43-46 (1996); NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY (2000); HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

<sup>41</sup> ICISS, *The Responsibility to Protect* (Dec. 2001), available at <<http://www.iciss.ca/report2-en.asp>> [hereinafter *The Responsibility to Protect*].

<sup>42</sup> For a discussion of the emergence of this concept, see Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99 (2007).

<sup>43</sup> *The Responsibility to Protect*, supra note 41, para. 6.37.

Council.<sup>44</sup> Further, the high-level panel identified five criteria of “legitimacy” when engaging in such intervention, relating to the seriousness of the threat, the proper purpose of the intervenors, the exhaustion of other means, proportionality, and a balancing of the ensuing consequences.<sup>45</sup> The U.N. Secretary-General thereafter generally endorsed the high-level panel’s approach<sup>46</sup> as did the General Assembly in its 2005 World Summit Outcome document,<sup>47</sup> though neither expressly adopted the five criteria nor expressly ruled out the unilateral use of force.<sup>48</sup>

While the ICISS drew the line for humanitarian intervention at “conscience-shocking situations crying out for action,” others have argued in favor of using force to protect a broader array of human rights. Thus, rather than limit the use of force only to extreme situations, such as to prevent genocide or crimes against humanity, some favor deployment of armed force to restore a democratic government to power (as arguably occurred with the U.S. intervention in Grenada in 1983). No doubt with an eye on these emerging threats, the *Nicaragua* Court issued statements casting doubt on the ability of states to use force to protect human rights<sup>49</sup> or to bring about regime change,<sup>50</sup> although those statements are probably best construed in the context of the facts presented and the positions pled (or not pled) in that case.

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<sup>44</sup> UN Secretary-General's High-level Panel Report, *supra* note 30, at paras. 203; *see also id.*, paras. 196, 272.

<sup>45</sup> *Id.*, para. 207.

<sup>46</sup> In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, U.N. Doc. A/59/2005, para. 135 (2005).

<sup>47</sup> 2005 World Summit Outcome, G.A. Res. 60/1, paras. 138-39 (Oct. 24, 2005).

<sup>48</sup> *See Stahn, supra* note 42, at 120 (finding that “states did not categorically reject the option of (individual or collective) unilateral action in the Outcome Document. This discrepancy leaves some leeway to argue that the concept of responsibility to protect is not meant to rule out such action in the future.”).

<sup>49</sup> Military and Paramilitary Activities in and against Nicaragua, *supra* note 24, at 134-35, at paras. 267-68.

<sup>50</sup> *Id.*, at 133, para. 263.

*F. Grave Threats from Transnational Terrorism*

If one were to identify the “new threats” faced at the beginning of the 21st century, many observers would likely point to the problem of potential projection of force on a massive scale by non-state actors, operating largely independently from state control or direction. The ability of non-state actors to project force across boundaries was readily apparent even before 9/11, but 9/11 seems to have raised the awareness level to unprecedented heights. It rather focuses one mind when a terrorist group, Al Qaeda, can organize itself so as launch an attack halfway around the world that inflicts, in a single day, some 3,000 casualties, destroying the World Trade Center, and severely damaging the command center of the U.S. military. Attacks associated with Al Qaeda have occurred annually since 9/11 in various countries from Spain to Indonesia to the United Kingdom.

Does the *jus ad bellum* speak to such attacks? By its terms, Article 2(4) prohibits uses of force by one state against another state. Article 51 is less definitive in addressing only inter-state behavior, but arguably the Charter was designed solely to speak to rights and obligations as between states, and any act of self-defense must be in response to an armed attack committed by or attributable to another state. The *Nicaragua* Court’s viewed attribution of non-state actor conduct to a state as a salient factor before the *jus ad bellum* is implicated, and that view was confirmed and apparently extended by the Court’s 2004 *Advisory Opinion on the Israeli Wall*.<sup>51</sup> In that opinion, the Court rather summarily dismissed Israel’s claim that it was acting in self-defense against attacks by terrorist groups. According to the Court, Israel could not possibly be acting in self-defense under Article 51 because Israel had not claimed that the terrorist attacks at issue were imputable to a foreign state and because those attacks were not transnational in nature, having occurred wholly within territory occupied by Israel.<sup>52</sup>

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<sup>51</sup> *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136 (July 9).

<sup>52</sup> *Id.*, at 194, para. 139.

The advisory opinion thus appears to extend the *Nicaragua* paradigm by saying that it is not possible under any circumstances to engage in an act of self-defense under international law against a non-state actor; rather, you can only engage in an act of self-defense against another state, and thus only in situations where the acts of the non-state actor are imputable to that other state. Why that is the case, however, especially in light of the reaction of the global community (including the Security Council, NATO, and the OAS) to the attacks by Al Qaeda of 9/11 as justifying a response in self-defense, the Court failed to explain, notwithstanding the admonitions of some of the judges in their separate opinions.<sup>53</sup> Criticisms of the Court's position may have prompted the Court to backtrack in its 2005 case concerning *Armed Activities on the Territory of the Congo*, where the Court more tentatively noted that, given the circumstances of the case, there was "no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces."<sup>54</sup>

The ability of non-state actors to project such force transnationally is coupled with the fear that the next time it will not be airplanes but a weapon of mass destruction. Considerable attention is paid to the possibility of a nuclear attack, yet there is also concern that chemical weapons will be used whose toxic properties produce physical or physiological effects—chlorine, phosgene, mustard gas, or nerve gases (such as sarin) come to mind. Similarly, there are fears that a terrorist group might concoct a biological weapon capable of disseminating infectious diseases or conditions that otherwise do not exist or only exist naturally, by using bacteria (*e.g.*, anthrax), viruses (*e.g.*, smallpox), or toxins (*e.g.*, ricin). There are, of course, considerable hurdles for non-state actors in

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<sup>53</sup> Compare Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62 (2005) with Iain Scobbie, *Words My Mother Never Taught Me—"In Defense of the International Court"*, 99 AM. J. INT'L L. 76 (2005); see also Christian J. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case*, 16 EUR. J. INT'L L. 963, 963 (2005) (finding that the Court's opinion on self-defense is "difficult to bring in line with modern state practice, and increases the pressure to admit other, non-written, exceptions to Article 2(4) of the UN Charter.").

<sup>54</sup> *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, 2006 I.C.J. 168, 223, para. 147 (Dec. 19, 2005).

obtaining and delivering such weapons, but they are not insurmountable hurdles, and highly-respected analysts believe the odds to be fairly high that such an attack will eventually occur.

Large-scale terrorist attacks through weapons of mass destruction are not the only “new threat.” Mavens of our “information age” observe that new methods of cyber-warfare are becoming a reality, by which states and non-state actors with a comparative disadvantage in hardware may seek to level the playing field through attacks on software. Even non-traditional dangers such as the transboundary movement of infectious diseases, living modified organisms, invasive plant species, or persistent organic chemicals may emerge as grave threats to which states seek to respond forcibly.

#### IV. REAFFIRMING OR RECODIFYING THE *JUS AD BELLUM*

##### A. *Maintaining the Status Quo*

Defenders of the static view of the *jus ad bellum* view the classic 1945 paradigm as normatively the best way of organizing inter-state behavior.<sup>55</sup> States are permitted to defend themselves when exposed to an armed attack and states are permitted to use force when authorized by the Security Council. In all other circumstances, uses of military force are prohibited, even if to intended to prevent human rights atrocities, because any further exceptions threaten to swallow the basic rules. Some defenders may maintain that the rule is sacrosanct, but concede (either publicly or in private conversation) that deviations in extreme situations are legitimate even if not technically lawful.

Critics of the static view assert that there are situations where uses of force should be allowed to promote world order, so they typically seek to read the original Charter text as allowing for

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<sup>55</sup> See, e.g., Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415 (2006).

exceptions.<sup>56</sup> On this approach, the Article 2(4)/51 construct sets forth imprecise standards that must be refined through state practice, so clever interpretations of what it means to use force “against territorial integrity” in Article 2(4) or what Article 51 means when it refers to an “inherent right” of self-defense allow these critics to embrace contemporary uses of force that are seen as desirable. Such interpretations are creative, but not particularly persuasive, and certainly have not garnered widespread support. Other critics adopt a more protean view, stating that the enormous changes in inter-state relations since 1945 merit rethinking the *jus ad bellum*.<sup>57</sup> Many international relations theorists and some international lawyers see the *jus ad bellum* as simply no longer reflecting contemporary law at all, if it ever did. For them, the *jus ad bellum* is essentially window dressing, trotted out by the major powers when it serves their interests to do so, but shoved aside without much ado when its proscriptions are inconvenient.<sup>58</sup>

Can this state of affairs, in the long term, endure? Will the current situation remain one hundred years hence? Given the uncertainty that has existed since 1945, it might plausibly be argued that maintaining the status quo is feasible and even desirable. The relatively conservative approach in static *jus ad bellum* helps discourage pernicious uses of force by limiting exceptions to the Article

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<sup>56</sup> For a discussion, see Olivier Corten, *The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16 EUR. J. INT’L L. 803 (2005).

<sup>57</sup> See, e.g., Richard N. Gardner, *Neither Bush Nor the “Jurisprudes,”* 97 AM. J. INT’L L. 585, 586 (2003) (“The new strategic environment, marked by suicidal terrorists and the spread of mass destruction weapons, requires a different approach.”); Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT’L L. 628, 637 (2007) (“If international rules governing resort to force are to endure, they must be built upon and reflect the realities of power and the security needs that confront states in the real world.”).

<sup>58</sup> See, e.g., Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005); Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16 (May/June 2003). For an effort to demonstrate that the *jus ad bellum* regime does impose prudential restraints on the major powers, “altering the manner and timing of their military actions in accordance with the legal arguments they have offered (or intend to offer) to justify those actions,” so much so that in some cases it contributes to the failure of those actions, see JOEL H. WESTRA, *INTERNATIONAL LAW AND THE USE OF ARMED FORCE: THE UN CHARTER AND THE MAJOR POWERS* 2, 153-54 (2007).

2(4) prohibition. While some further deviations might be desirable, and while lawyers may like to have clear and transparent rules that are routinely and uniformly followed, perhaps law in this area should be somewhat vague, generally coercing states into pacific behavior but providing enough “play-in-the-joints” to accommodate major power politics in a world that cannot be neatly packaged. To navigate those uncertainties, a Security Council exists to help interpret when a state ranges too far outside the gray lines, thereby tacitly allowing some uses of force (*e.g.*, Israel’s preemptive self-defense in the 1967 War) while rejecting others (*e.g.*, Israel’s attack on the Osirak nuclear facility). Similarly, the Security Council is available to authorize uses of force that are necessary to address extraordinary circumstances that do not fit static *jus ad bellum*, such as to stop a government from inflicting genocide or crimes against humanity upon its own people. On this account, the main purposes of the Article 2(4)/Article 51 paradigm have been met by essentially eliminating the recourse to war for territorial expansion, and largely reducing other types of coercion by forcing states to justify their actions as self-defense against an armed attack, and to risk the approbation when the justification is weak. The system may not be perfect, but states are generally comfortable with it, and it is relatively stable.

On the other hand, a fairly plausible case can be made that there is already far too much confusion and uncertainty in how the *jus ad bellum*, as crafted in 1945, should be applied in addressing the wide range of contemporary threats, and that matters may well get worse over the next century. While transboundary uses of force may not be a daily occurrence, they are not infrequent, and their adverse affects can be quite grave. The casualness with which Turkey may move armed forces across the border into Iraq to attack PKK bases (discussed below), without any notable condemnation by the international community of the action as unlawful, is striking. Any normative system has gaps and uncertainties, but the list of challenges to the *jus ad bellum*—on rescue of nationals, humanitarian intervention, indirect aggression, responses to coercion not considered an “armed attack,” responses to coercion by non-state actors, anticipatory self-defense, preemptive self-defense—is rather long.

The Security Council does condemn and occasionally act against some of the most egregious

violations of the *jus ad bellum*, but the system is not, and should not, be designed to regard as permissible all uses of force that are not condemned by the Security Council; indeed, even when blatant aggression occurs, the Security Council does not always act, such as when Iraq invaded Iran in 1980 or Eritrea invaded Ethiopia in 1998. Moreover, as is well known, even after the Cold War, the Security Council is inhibited from either condemning or authorizing uses of force when any one of the five permanent members politically opposes such action, as occurred with respect to Kosovo in 1999. While there are areas of common interests among the Security Council members, those interests are often not in alignment, as can be seen in recent discussions over how to address Iran's nascent nuclear program (resistance from Russia) or the humanitarian crisis in Darfur, Sudan (resistance from China). And, like any institution, the Security Council makes mistakes.<sup>59</sup>

To illuminate the problem with the status quo, one might consider the range of conflicting practice over just the past two years with regard to whether a state may respond to a terrorist attack by undertaking a cross-border raid against a terrorist camp without the consent of the host state:

- In the summer of 2006, the Hezbollah movement, operating out of Lebanon, crossed into Israel's northern border, attacked and killed several Israeli soldiers, seizing two as hostages, before returning to Lebanon. Israel responded by sending military forces into, and by bombing portions of, southern Lebanon in an effort to secure the release of the soldiers and to diminish Hezbollah's military capabilities. During the course of the hostilities, Hezbollah fired some 4,000 rockets across the border into Israel, which Human Rights Watch determined intentionally targeted the civilian population.<sup>60</sup> Rather than condemn Israel's action, the Security Council expressed

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<sup>59</sup> See, e.g., Therese O'Donnell, *Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)*, 17 EUR. J. INT'L L. 945 (2006).

<sup>60</sup> Human Rights Watch, *Civilians under Assault: Hezbollah's Rocket Attacks on Israel in the 2006 War* (Aug. 29, 2007), available at <<http://hrw.org/reports/2007/iopt0807/>>. Human Rights Watch also concluded that, in its response, Israel frequently failed to distinguish between



“its utmost concern at the continuing escalation of hostilities in Lebanon and in Israel since Hezbollah’s attack on Israel on 12 July 2006” and welcomed Lebanon’s efforts “to extend its authority over its territory, through its own legitimate armed forces, such that there will be no weapons without the consent of the government of Lebanon and no authority other than that of the government of Lebanon.”<sup>61</sup>

- In January 2007, the Palestinian militant organization and political party Hamas was elected as the government of the Palestinian Authority. In June of that year, Hamas seized control of the Gaza strip from Fatah-controlled Palestinian security forces. Since 2002, Hamas has used homemade (relatively crude) Qassam rockets launched from the Gaza Strip to hit Israeli towns in the Negev. More recently, Iranian-made rockets have allowed Hamas to reach large Israeli cities, such as Ashkelon (population of 120,000). That increased capability prompted Israel in early 2008 to launch a major military ground operation as well as air strikes against Hamas fighters in the Gaza Strip.<sup>62</sup> To date, no resolutions have been adopted by the Security Council or General Assembly on the matter.
- In October 2007, the Turkish government received a one-year authorization from its parliament to conduct military operations in northern Iraq against the Kurdish

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military and civilian targets, and failed to take adequate safeguards to prevent civilian casualties. See Human Rights Watch, *Why They Died: Civilian Casualties in Lebanon during the 2006 War* (Sept. 6, 2007), available at <http://hrw.org/reports/2007/lebanon0907/>.

<sup>61</sup> S.C. Res. 1701 (Aug. 11, 2006); see Andreas Zimmermann, *The Second Lebanon War: Jus Ad Bellum, Jus In Bello and the Issue of Proportionality*, 11 MAX PLANCK YRBK. U.N. LAW 99 (2007); Tom Ruys, *Crossing the Thin Blue Line: An Inquiry into Israel’s Recourse to Self-Defense Against Hezbollah*, 43 STAN. J. INT’L L. 265 (2007).

<sup>62</sup> See Griff Witte, *60 Gazans Killed in Incursion by Israel*, WASH. POST, Mar. 2, 2008, at A1; Taghreed El-Khodary & Isabel Kershner, *As Israelis Pull Out of Gaza, Hamas Celebrates Rocketry*, N.Y. TIMES, Mar. 4, 2008, at A1.

separatist guerilla organization known as the Kurdistan Workers' Party (or PKK).<sup>63</sup> Since its founding in the 1970's, the PKK has sponsored numerous attacks against Turkish forces as a part of its campaign to establish an independent Kurdistan. By some estimates, over the past three decades, Turkey has responded with twenty-four cross-border attacks into Iraq,<sup>64</sup> but has failed to route the PKK. The most recent response involved air strikes against PKK camps and villages,<sup>65</sup> as well as an eight-day ground offensive.<sup>66</sup> Although both the United States and the European Union expressed concerns about Turkey's action, to date no resolutions have been adopted by the Security Council, the General Assembly, the European Union, or NATO condemning Turkey's conduct as unlawful.

- In January 2008, the United States launched a pilotless CIA Predator aircraft from a base within Pakistani territory which proceeded to fire two Hellfire missiles into a compound of buildings near the Pakistani town of Mir Ali, reportedly killing a senior Al Qaeda commander. While the United States previously had requested specific permission from the Pakistani government for such operations, in this instance such permission was not sought,<sup>67</sup> though it may have been the product of a general U.S.-

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<sup>63</sup> The parliamentary vote was 507 to 19 in favor of using military force by means of strategic strikes or a large-scale invasion. See Molly Moore, *Turkey Authorizes Iraq Incursion*, WASH. POST, Oct. 18, 2007, at A1. Both the United States and the European Union have classified the PKK as a terrorist organization.

<sup>64</sup> *Id.*

<sup>65</sup> See Alissa Rubin & Sabrina Tavernise, *Turkey's Warplanes Attack Villages in Iraqi Kurdistan*, N.Y. TIMES, Feb. 5, 2008, at A9; Joshua Partlow, *Turkey Resumes Strikes in Iraq's North*, WASH. POST, Mar. 6, 2008, at A18.

<sup>66</sup> See Sabrina Tavernise & Richard Oppel, *After 8 Days, Turkey Pulls Its Troops Out of Iraq*, N.Y. TIMES, Mar. 1, 2008, at A8.

<sup>67</sup> See Joby Warrick & Robin Wright, *Unilateral Strike Called a Model For U.S. Operations in Pakistan*, WASH. POST, Feb. 19, 2008, at A1.

Pakistani arrangement allowing unilateral U.S. action.<sup>68</sup>

- In December 2006, Ethiopian military forces ousted from power in Somalia a group of Sharia Courts known as the Islamic Courts Union (ICU). The ICU had united themselves to form a rival administration to the Transitional Federal Government (TFG) of Somalia, and had succeeded in controlling most of southern Somalia and the vast majority of its population. Since ouster of the ICU from power, the United States has launched from its naval vessels at least four missile strikes in Somalia against Islamic leaders accused of being terrorists.<sup>69</sup> (For example, one of the strikes targetted a Kenyan who is believed to have played a major role in the bombings of two U.S. embassies in Africa in 1998.) The TFG reportedly has allowed the United States a free hand in undertaking such attacks though, since the TFG faces a widespread civil war, its ability to authorize external interference is open to question.
- A classified 2005 U.S. document concerning rules of engagement in Iraq envisaged the ability of U.S. military forces to cross from Iraq into Iran, Syria or other countries bordering Iraq, even without those countries' consent.<sup>70</sup> Generally, such action was only authorized after securing approval from the U.S. Secretary of Defense, which might entail obtaining Presidential approval. Yet according to the document, Secretary of Defense approval was not necessary in situations of hot pursuit from Iraq into Iran or Syria against former members of Saddam Hussein's government and terrorists, or "when Syria or Iran cannot or will not prevent a hostile force from using

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<sup>68</sup> See Eric Schmitt & David Sanger, *Pakistan Shift Could Curtail Drone Strikes*, N.Y. TIMES, Feb. 22, 2008, at A1; Robin Wright & Joby Warrick, *U.S. Steps Up Unilateral Strikes in Pakistan*, WASH. POST, Mar. 27, 2008, at A1.

<sup>69</sup> See Stephanie McCrummen, *U.S. Strike in Somalia Targets Terror Suspects*, WASH. POST, Mar. 4, 2008, at A13.

<sup>70</sup> U.S. Rules of Engagement for Iraq, *available at* [http://www.wikileaks.org/wiki/US\\_Rules\\_of\\_Engagement\\_for\\_Iraq](http://www.wikileaks.org/wiki/US_Rules_of_Engagement_for_Iraq).

their airspace, land territory, internal waters or territorial seas to attack US and/or designated forces and the hostile force constitutes an imminent threat to ongoing operations.<sup>71</sup>

- On March 1, 2008, Colombian military forces bombed and crossed into Ecuador to attack guerrillas of the Revolutionary Armed Forces of Colombia (FARC), who maintain camps along the border. Colombia regards the FARC as a terrorist and drug-trafficking organization, while some in the region see them as revolutionaries fighting a U.S.-backed puppet government. Ecuador and Venezuela responded to the raid by sending troops to their borders with Colombia, while Nicaragua broke off diplomatic relations with Colombia.<sup>72</sup> In this instance, neither the Security Council nor the General Assembly condemned that action. The Organization of American States, however, adopted a resolution declaring the Colombian raid to be a violation of Ecuador's sovereignty, though stopping short of expressly condemning Colombia.<sup>73</sup>

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<sup>71</sup> *Id.*, para. 3(D)(1)(B).

<sup>72</sup> See James McKinley, Jr., *Nicaragua Breaks Ties With Bogotá*, N.Y. TIMES, Mar. 7, 2008, at A6.

<sup>73</sup> The United States was the only country in the Western Hemisphere expressly supporting the Colombian action. See Simon Romero, *Regional Bloc Says Ecuador's Sovereignty Was Violated*, N.Y. TIMES, Mar. 6, 2008, at A3. The resolution provided:

*Considering:*

That on the morning of Saturday, March 1, 2008, military forces and police personnel of Colombia entered the territory of Ecuador, in the province of Sucumbíos, without the express consent of the government of Ecuador to carry out an operation against members of an irregular group of the Revolutionary Armed Forces of Colombia who were clandestinely encamped on the Ecuadorian side of the border;

That that act constitutes a violation of the sovereignty and territorial integrity of Ecuador and of principles of international law;

....

These examples indicate that many states are concerned about the legality of the cross-border uses of force against terrorist camps, but that condemnation on the basis of a legal violation is erratic, perhaps suggesting that a much more nuanced legal standard may be operating than is captured by the static *jus ad bellum* paradigm. On issues such as this, as time progresses, the static *jus ad bellum* position may become increasingly questioned and viewed as untenable or unconvincing.

Hence, the argument against the status quo is that civilized societies can and should do better, at least if they aspire to the maintenance of international peace and security through predicable and transparent processes. As Secretary-General Kofi Annan stated in his 2005 report *In Larger Freedom*,

an essential part of the consensus we must seek must be agreement on when and how force can be used to defend international peace and security. In recent years, this issue has deeply divided Member States. They have disagreed about whether States have the right to use military force pre-emptively, to defend themselves against imminent threats; whether they have the right to use it preventively to defend themselves against latent or non-imminent threats; and whether they have the right—or perhaps the obligation—to use it protectively to rescue the citizens of other States from genocide or comparable crimes. . . . Agreement must be reached on these questions if the United Nations is to be—as it was intended to be—a forum for resolving differences rather than a mere stage for acting them out.<sup>74</sup>

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*Resolves,*

1. To reaffirm the principle that the territory of a state is inviolable and may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatsoever. . . .

OAS CP/Res. 930 (1632/08) (Mar. 5, 2008).

<sup>74</sup> *In Larger Freedom: Towards Development, Security, and Human Rights for All*, Report of the Secretary-General, U.N. Doc. A/59/2005, paras. 122-23 (Mar. 21, 2005).

In the face of such uncertainty, consideration should be given to a formal reaffirmation of the static *jus ad bellum* position if that position truly reflects contemporary global expectations. By “reaffirmation” of the static *jus ad bellum*, I do not mean a statement of the kind that was issued at the 2005 World Summit. At that meeting, some 150 world leaders adopted a declaration that, among other things, reiterated “the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter of the United Nations,”<sup>75</sup> and reaffirmed “that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security.”<sup>76</sup> Such a “reaffirmation” fails to grapple directly with differing interpretations of what the Charter actually requires—it simply papers over those differences. Instead, a true reaffirmation would specifically address how the *jus ad bellum* relates to contemporary threats.

Alternatively, if contemporary global expectations diverge from the static position, then a recodification of the *jus ad bellum* may in order. By recodification, I mean a restatement of the rudimentary rules of the *jus ad bellum* in light of the wide range of threats that have already occurred and will continue to occur in the years to come. In essence, it would be an effort to engage in the same conversation today that occurred when the major powers at Dumbarton Oaks in 1944 drafted what became Article 2(4) and when the San Francisco conference adopted Article 51 in 1945.

Trying to reaching a consensus either on a reaffirmation of the static *jus ad bellum* position or on a recodification of the changed *jus ad bellum* may well be politically infeasible, given the significance of the issue, the rhetorical posturing that governments engage in, the considerable divide between more powerful and less powerful states, and the potential for any process to be sidetracked by current events. Recent efforts by even non-governmental entities, such as the ICISS and the 2005 U.N. high-level panel , have revealed the difficulties and controversy that any such effort will entail. Indeed, a credible argument might be made that the only point at which the *jus ad bellum* will be ripe

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<sup>75</sup> 2005 World Summit Outcome, U.N. Doc. A/60/L.1, para. 77 (Sept. 15, 2005).

<sup>76</sup> *Id.*, para. 79.

for either reaffirmation or recodification is when it completely breaks down, ushering in a new era for rebuilding or strengthening international institutions. The ICISS's *Responsibility to Protect* report candidly noted that "it would be impossible to find consensus, in the Commission's view, around any set of proposals for military intervention which acknowledged the validity of any intervention not authorized by the Security Council or General Assembly."<sup>77</sup>

Indeed, perhaps the strongest argument for adhering to the status quo is not that the static *jus ad bellum* is a stable and intrinsically optimal regime, but that efforts to move to a more protean conception will be even more destabilizing, forcing states and non-state actors to confront a normative system over which they have fundamental disagreements. Deep schisms between powerful states and less-powerful states, and even among close allies, may well be revealed and become more entrenched. The considerable difficulties that the NATO states encountered in identifying a legal theory justifying their actions to protect Kosovo provide a window on the problems that would be faced in either reaffirming or recodifying the *jus ad bellum*. Imagine the difficulty in securing agreement between the United States and the developing world about preemptive self-defense, or between France and China over humanitarian intervention, and the problem becomes manifest. As such, better to let sleeping dogs lie.

Nevertheless, given that efforts like ICISS or the High Level Panel are already occurring, we may be entering a period where a reaffirmation or recodification of the *jus ad bellum* is viewed as politically feasible and desirable. While strong adherence to the core paradigm remains, powerful sentiments are emerging in favor of a more sophisticated normative system, driven by the rise of human rights, the threat of terrorism, and the fear of weapons of mass destruction. As these sentiments become more insistent, initiatives such as ICISS and the 2005 U.N. high-level panel may prove to be just the first wave in efforts to revisit and reevaluate the *jus ad bellum*. Developing countries, faced with issues such as threats of non-proliferation, are acting in a manner that might

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<sup>77</sup> *Responsibility to Protect*, *supra* note 41, para. 6.37.

not have been predicted even a few years ago.<sup>78</sup>

Notably, the International Criminal Court (ICC) Statute contemplates that the Court will exercise jurisdiction over the crime of aggression once the states parties adopt a provision at their review conference (scheduled for 2010) setting forth a definition of aggression and the conditions under which the Court could exercise its jurisdiction over it.<sup>79</sup> At present, a special working group has been established by the ICC Assembly of State Parties toward that end, and may result in a formulation of aggression that reaffirms or recodifies the static *jus ad bellum*. Even if the ICC's work essentially cross-references to the UN Charter, leaving current uncertainties intact, placing aggression within the scope of the ICC's mandate may well galvanize states into a reaffirmation or recodification process, as a means of clarifying when government leaders may be exposed to charges of criminal conduct. Some states may resist reaching a consensus, but non-state actors may be powerful agitators for a consensus position to emerge. And while it often seems that certain hurdles in interstate relations are insurmountable, there are plenty of examples, even in recent years, of those hurdles being swept aside by powerful currents of history (the reunification of Germany, the demise of South African apartheid, or the establishment of an international criminal court come to mind).

Defenders of static *jus ad bellum* might be correct that, notwithstanding all the new inter-state influences since 1945, the prevailing view today is still in favor of a strictly interpreted *jus ad bellum*; but if that is true, perhaps the time has come to formally reaffirm it. If it is not true, then perhaps the time has come to recodify the *jus ad bellum* so as to ensure its continuing relevance for inter-state relations and to provide it with a stronger pedigree than currently exists.

#### B. *Debating Reaffirmation or Recodification*

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<sup>78</sup> See, e.g., Tanya Ogilvie-White, *International Responses to Iranian Nuclear Defiance: The Non-Aligned Movement and the Issue of Non-Compliance*, 18 EUR. J. INT'L L. 453 (2007).

<sup>79</sup> See Rome Statute of the International Criminal Court, art. 5(2), July 17, 1998, 2187 U.N.T.S. 90.



If maintaining the status quo is unstable, what directions should a contemporary debate over the *jus ad bellum* take? A starting point might be to approach the *jus ad bellum* more holistically than is usually the case. The standard approach in international legal analysis is to slice the *jus ad bellum* up into segments, in which consideration is given to issues such as rescue of nationals, humanitarian intervention, anticipatory self-defense, and so on. Within each segment, state practice is tallied up as showing either “legality” or “illegality” so as to reach a conclusion about the permissibility of using force in that particular context. Yet doing so is unsatisfactory, given that state practice tends to be spare, conflicting, and susceptible to alternative interpretations.

If instead, one were to step back from these segments so as to ask broader questions about when it is that the global community (however that might be defined) generally seems to favor uses of force, then the picture might become clearer. Certain general parameters would seem to be relatively accurate in helping to predict whether coercive behavior is acceptable, no matter the context in which it is deployed. Those parameters might concern: (1) the degree of coercion actually inflicted by State A upon State B or its nationals; (2) the gravity of coercion that State A fears from State B; (3) the extent to which other States are condoning State A’s coercion; (4) the pedigree of State B as a member of the international community; (5) the degree to which State A’s coercion is tailored to respond to the threat from State B; or (6) the degree to which State A’s coercion has adverse collateral consequences for other states or persons.

Under such a holistic approach, one would not read the global response to the attacks of 9/11 as solely relevant to the issue of permissible uses of force against a non-state actor, although it is certainly relevant to that issue. Rather, one would apply the precedent more broadly as relevant to our understanding of how the *jus ad bellum* operates in various circumstances. In other words, the 9/11 precedent can shed light on: (1) what constitutes an armed attack?; (2) how immediate must a likely further attack be before a state can respond in self-defense?; (3) what level of collective support or endorsement is possible when embarking on an act of self-defense?; (4) what kinds of delinquent acts might be held against a state from its past when considering its ability to invoke standard rights of sovereignty today under international law?; and (5) how does the gravity of the

attack effect the scope of necessity and proportionality accorded to the defending state?

A second beneficial direction might entail analyzing relevant norms or instruments that are not, strictly speaking, a part of the *jus ad bellum*, but that offer a window on contemporary community expectations. For example, in thinking through whether a state can engage in self-defense against a non-state actor who is believed to be acquiring weapons of mass destruction, it seems relevant to note that the Security Council in 2004 decided that all states must prohibit non-state actors in their territory from manufacturing or acquiring such weapons.<sup>80</sup> Assuming that the resolution is within the power of the Security Council (some have claimed it to be *ultra vires*), then it seems highly relevant to the issue of the relationship of a state to non-state actors in its territory, and may serve to bridge whatever links of attribution are necessary to allow self-defense against that non-state actor.

Similarly, one might consider how evolutions in the *jus in bello* over time might be affecting the *jus ad bellum*. The 2006 U.S. Supreme Court case *Hamdan v. Rumsfeld*<sup>81</sup> reached the conclusion that when common Article 3 refers to an armed conflict that is not international in nature, that includes the conflict between the United States and al Qaeda. One can argue about whether that was the right conclusion: (1) on the one hand, according certain minimal protections to the Guantanamo detainees using common Article 3 and Protocol I Article 75 seems like a good thing; (2) on the other hand, Common Article 3 was probably intended only to address internal armed conflict, not transnational armed conflict involving a state and a non-state actor. The point, however, is that if the *Hamdan* court is right—or even if we set aside the *Hamdan* decision and simply consider the protections that exist in common Article 3 and Protocol II for non-state actors—one arrives at a place where the *jus in bello* is trying to take account of and regulate activities relating to non-state actors. Should not the *jus ad bellum* do so as well?

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<sup>80</sup> S.C. Res. 1540, para. 2 (Apr. 28, 2004). For commentary, see Daniel H. Joyner, *Non-Proliferation Law and the United Nations System: Resolution 1540 and the Limits of the Power of the Security Council*, 20 LEIDEN J. INT'L L. 489 (2007).

<sup>81</sup> 548 U.S. 557 (2006).

In an essay of this length, a standard ploy might be to plead that there is not enough time to actually craft a proposed reaffirmation or recodification but, as a starting point, one could imagine the following as possible starting points:

<b>Reaffirmation of Static <i>Jus Ad Bellum</i></b>	<b>Recodification of Protean <i>Jus Ad Bellum</i></b>
<p>1. The use or threat of use of armed force by one state against another state is prohibited in all circumstances unless:</p> <p>a) taken in response to a prior armed attack by another state until the Security Council has taken the measures necessary to maintain international peace and security; or</p> <p>b) authorized by the Security Council as a means of addressing, under Chapter VII of the Charter, a threat to the peace, breach of the peace, or act of aggression.</p> <p>2. Measures taken in the exercise of the right of self-defense shall be immediately reported to the Security Council.</p> <p>3. All uses of armed force must be necessary and proportionate in relation to the threat that has arisen and must be undertaken in accordance with applicable international humanitarian law.</p>	<p>1. The use or threat of use of armed force by one state against another state is prohibited unless undertaken in accordance with paragraphs (2)-(6).</p> <p>2. The Security Council may authorize the use of armed force by a state as a means of addressing, under Chapter VII of the Charter, a threat to the peace, breach of the peace, or act of aggression.</p> <p>3. A state may use or threaten to use armed force against another state in response to an actual or imminent armed attack by that other state, including an attack in the form of the seizure of nationals, until the Security Council has taken the measures necessary to maintain international peace and security.</p> <p>4. A state may use or threaten to use armed force against another state in response to an actual or imminent widespread deprivation of fundamental human rights, after notification to and debate of the matter at the Security Council, until the Security Council has taken the measures necessary to maintain international peace and security. To the extent possible, such action shall be taken through regional or sub-regional organizations.</p> <p>5. States may use or threaten to use armed force against a non-state actor located in another state in the circumstances set forth in (3), but only if the other state has been provided a reasonable opportunity to address the matter directly, and has either refused to do so or is incapable of doing so.</p> <p>6. Measures taken under (3), (4), or (5) shall be immediately reported to the Security Council.</p> <p>7. All uses of armed force must be necessary and proportionate in relation to the threat that has arisen and must be undertaken in accordance with applicable international humanitarian law.</p>

Obviously, certain normative choices have been made in the proposed reaffirmation and proposed recodification, placing them at somewhat opposite ends of a potential spectrum of options. Further, the proposals above largely remain captured by the subject matter divisions in possible uses of force, rather than utilizing some of the more abstract (and perhaps controversial) factors suggested previously in this section. Nevertheless, these proposals may serve as a starting point for achieving a consensus on the contemporary preferences of states or non-state actors regarding the *jus ad bellum*.

### *C. The Means of a Reaffirmation or Recodification*

The political feasibility of reaffirming or recodifying the *jus ad bellum* would turn on addressing not just the substance of the law but the means for establishing that substance. The most formal means of change, amendment of the Charter, is the least likely path to success, while the least formal change, through statements of non-governmental actors, may attract insufficient state adherence to be effective. Various possibilities exist that will no doubt be explored, to one degree or another, in the years to come.

*Through Amendment of Charter.* Though the Charter can be amended, the process for doing so is cumbersome, requiring a vote of two thirds of the members of the General Assembly and then ratification by two thirds of the UN members, including all the permanent members of the Security Council.<sup>82</sup> Successful amendments have only occurred five times, all on issues relating to the increase in the size of the UN membership, not as a means of altering the substantive rights and obligations set forth in the Charter. Hence, the procedural hurdles of this process are quite significant and, absent tectonic shifts in geopolitics, likely insurmountable.

*Through UNGA Resolution.* Technically, the General Assembly has no express power to issue a resolution binding upon all states as to the meaning of Articles 2(4) and 51. Nevertheless, the *travaux préparatoires* of the Charter, and the jurisprudence of the International Court, have recognized the competence of organs of the United Nations, in the first instance, to interpret

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<sup>82</sup> U.N. Charter, *supra* note 4, art. 108.

provisions of the Charter relevant to their work. Though the Security Council is the principal UN organ for addressing peace and security, it is not the exclusive authority, leaving to the General Assembly an important and relevant role.<sup>83</sup> Further, since the General Assembly has within it representation of all states, resolutions that it adopts by consensus or by overwhelming majority that purport to recognize existing norms of international law can be highly authoritative evidence that such law exists. With respect to the *jus ad bellum*, the General Assembly has previously played a role through its adoption of various resolutions, including its resolutions on friendly relations<sup>84</sup> and, as previously noted, on aggression, and remains available to do so today, as evidenced by the 2005 World Summit Outcome document.

The problem with this venue is that the General Assembly has not proven to be a particularly effective body for engaging in sophisticated brokering of views between states over contentious issues. The political dynamics within the Assembly tends to drive toward an outcome that either only reflects the largest bloc of non-aligned states or that represents a consensus view concerning text that has little meaning. Whether a global parliament<sup>85</sup> based on popular representation, rather than on representation of states, would avoid such pitfalls is unclear, but if one were to emerge it, too, could be a potential venue.

*Through UNSC Resolution.* This option may represent the most intriguing possibility, given the increased activity of the Security Council in the post-Cold War era, the power of the Security Council to issue decisions that bind all UN members, and the Council's willingness to engage in "legislative-type" resolutions on fundamental security issues, such as controls on terrorist financing and proliferation of weapons of mass destruction.<sup>86</sup> At present there seems to be little P-5 agreement

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<sup>83</sup> See Advisory Opinion on Certain Expenses of the United Nations, 1962 I.C.J. 151 (July 20).

<sup>84</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) (Oct. 24, 1970).

<sup>85</sup> See, e.g., Richard Falk & Andrew Strauss, *Toward Global Parliament*, 80 FOREIGN AFF. 212 (Jan./Feb. 2001).

<sup>86</sup> See S.C. Res. 1373 (Sept. 28, 2001); S.C. Res. 1540 (Apr. 28, 2004).

on a recodification of the *jus ad bellum*, but there are emerging areas of common interest (e.g., the ability to strike at terrorist havens) and it not beyond imagination that at some point a political alignment would occur to issue a resolution that “clarifies” the meaning of the *jus ad bellum*.

*Through Major Power Agreement.* If reaching agreement within the major political institutions is difficult, another path would be for the major powers to reach agreement on instances when they favor or at least will not oppose uses of military force, as well as those circumstances where they will oppose the use of force. The composition of this group might include the P-5 and other states, or might be more oriented toward North American and West European states. Any product from such a group by itself would be non-binding, but it would help illuminate the beliefs of those states who are most likely to deploy military force. Other states could react to whatever declaration emerges from this process, providing a basis for identifying areas of agreement and disagreement.

*Through Case Law.* At least within international legal circles, there is an acceptance that the decisions of the International Court of Justice and other competent international courts carry considerable weight in identifying international law, including changes that have occurred in the law. To the extent that the *jus ad bellum* requires reaffirmation or recodification, which cannot be secured through political organs of the United Nations, then perhaps international courts are the place to look. Arguably reaffirmation is exactly what the International Court has done in its jurisprudence; its decision in the *Oil Platforms* case<sup>87</sup> might best be understood as confirming the static *jus ad bellum* and eschewing any explicit, significant new contribution to the notion of self-defence.<sup>88</sup>

One problem with reliance on case law, however, is that the cases are extremely sparse and often present anomalous factual scenarios that are not easily or convincingly extrapolated to broader statements about the meaning of the *jus ad bellum*. Indeed, given the importance of the subject, it

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<sup>87</sup> *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6).

<sup>88</sup> See Natalia Ochoa-Ruiz & Esther Salamanca-Aguado, *Exploring the Limits of International Law Relating to the Use of Force in Self-Defence*, 16 EUR. J. INT’L L. 499 (2005).

is rather remarkable that the International Court went for fifty years having only squarely addressed the *jus ad bellum* in one case (the *Nicaragua* case). In the post-Cold War era, there has been a somewhat greater willingness for cases to be brought to the Court and for the Court to address, on the merits, matters related to the *jus ad bellum*. Yet even so, cases such as the 1996 *Advisory Opinion on the Legality of Nuclear Weapons*,<sup>89</sup> the 1998 *Spain/Canada Fisheries Jurisdiction* case<sup>90</sup> (which provided the Court an opportunity to opine on what sort of coercion does not squarely fall within Article 2(4) of the Charter), the 2003 *Iranian Oil Platforms* judgment, 2004 *Advisory Opinion on the Israeli Wall*,<sup>91</sup> and the 2005 *Congo/Uganda Armed Activities* case,<sup>92</sup> have left many questions unanswered about the contours of the *jus ad bellum*. Perhaps to fill the gap, other tribunals are joining in as well. In December 2005, the Eritrea Ethiopia Claims Commission found that Eritrea violated UN Charter Article 2(4) by invading and occupying parts of Ethiopia or Ethiopian-administered territory in May 1998.<sup>93</sup> In September 2007, an arbitral panel convened under the Law of the Sea Convention found a violation of Article 2(4), this time in the form of a *threat* to use force by a Surinamese patrol boat against an oil rig.<sup>94</sup> Yet these tribunals too have been fairly cautious and sometimes cursory in their treatment of the law.

Broadly speaking, courts and tribunals have done little to advance understandings about whether and how to adapt the *jus ad bellum* to contemporary threats or crises, with the most notable example perhaps being the International Court's cursory treatment of the issue of attacks by non-state actors in the *Israeli Wall* advisory opinion. While a general advisory opinion might be sought from

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<sup>89</sup> *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8).

<sup>90</sup> *Fisheries Jurisdiction (Spain v. Can.)*, 1998 I.C.J. 432 (Dec. 4).

<sup>91</sup> *See supra* note 51.

<sup>92</sup> *See supra* note 54.

<sup>93</sup> *Partial Award on the Jus ad Bellum*, Ethiopia's Claims 1-8, *dispositif* at para. B(1) (Erit.-Eth. Cl. Comm. Dec. 19, 2005), *reprinted in* 45 I.L.M. 430 (2006).

<sup>94</sup> *Award of the Arbitral Tribunal (Guyana v. Suriname)*, para. 445 (Sept. 17, 2007). The oil rig had been authorized by Guyana to engage in exploratory drilling on a part of the continental shelf in dispute between the two states.



the International Court of Justice on the scope of contemporary *jus ad bellum*, it seems likely that the Court would be extremely cautious in issuing such an opinion, uncertain how its views might be received by states, and reluctant to provide more than the most general of views. Perhaps it is simply too much to expect international courts to lead the way in this area.

*Through “Principles” Adopted by Non-State Actors.* Considerable international legal scholarship in recent years has focused on the rise of the non-state actor as a critical feature of the ways in which international law is created, interpreted, and even enforced.<sup>95</sup> Epistemic communities operating across boundaries are doing much to galvanize public opinion on key issues of transnational law, which in turn influences the ways states conduct themselves.

As the work of the ICISS and the 2005 U.N. high-level panel show, there are roles that can be played by non-governmental organizations or expert groups in attempting to articulate and clarify the central norms of the *jus ad bellum*. The work product of such initiatives is not regarded as binding upon states, and hence may not be effective, but it can be the starting point for a process that flowers into a formal arrangement, as may be seen in initiatives ranging from the regulation of land mines to the establishment of the international criminal court.<sup>96</sup>

## VII. CONCLUSION

While the *jus ad bellum* has a hardened normative core that is widely accepted by states, there appears to be considerably less consensus around the margins of the norm, with its application changing considerably based on the context in which the norm is being applied. In this sense, the *jus ad bellum* has a much more protean nature than is commonly recognized by states and non-state actors. The traditional approach of seeing uses of force as being lawful/unlawful base solely on

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<sup>95</sup> See ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 41-97 (2007).

<sup>96</sup> See JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 284 (2005) (“Certain structural aspects of IOs, including provision for access to documents and for ‘observer’ or other forms of non-voting status, have provided entry points for NGOs’ growing participation in various forms of inter-state diplomacy, including treaty-making.”).

whether they are taken in self-defense against a prior armed attack, or with Security Council authorization, increasingly seems unconvincing or, at a minimum, a poor predictor of the likely response of the global community. That does not mean that the *jus ad bellum* has no part to play on the margins; it retains an important role in conditioning global conduct and reactions to that conduct, but that role may increasingly diminish in the years to come.

Three options present themselves. States and non-state actors can continue to operate under the current system, which tends to view the *jus ad bellum* as a static law unchanged since 1945. Strong reasons support this option, including the claim that the current system is reasonably stable and could be significantly destabilized by moving to a different position. Alternatively, if the existing system is not stable or will become unstable over time, and if that instability is partly due to a belief in some quarters that times have changed since adoption of the original Charter paradigm, then states and non-state actors could seek to reaffirm the static *jus ad bellum*, if that remains the consensus position. Finally, if the status quo is untenable, and there is no consensus on the static view, then states and non-state actors might do well to seek consensus on a recodification of the *jus ad bellum* to reflect its protean nature.

A formal reaffirmation or recodification in the near-term may be politically infeasible, but various factors may push the global community in that direction in the years to come. Even short of developing a new global consensus, for the *jus ad bellum* to retain a vibrant, authoritative role in inter-state relations, it likely needs to find ways to accommodate new threats to the global order, through more refined decisions of international courts, more sophisticated approaches to international treaties and UN resolutions, and sharper analysis in the academy.